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No. 92-1500

In The
Supreme Court of the United States
OCTOBER TERM, 1992

PAUL CASPARI, Superintendent
of the Missouri Eastern
Correctional Center, and
JEREMIAH W. (JAY) NIXON,
Attorney General of Missouri — **PETITIONERS**

V.

CHRISTOPHER BOHLEN — **RESPONDENT**

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE **AMICI CURIAE** THE STATES OF ARKANSAS, NEBRASKA, SOUTH CAROLINA, PENNSYLVANIA, TENNESSEE, AND WYOMING IN SUPPORT OF **PAUL CASPARI,** Superintendent of the Missouri Eastern Correctional Center, and **JEREMIAH W. (JAY) NIXON,** Attorney General of Missouri

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STATEMENT OF THE INTEREST OF THE AMICI CURIAE

Amici curiae are States with capital punishment statutes that support the position of the petitioners, Paul Caspari, Superintendent of the Missouri Eastern Correctional Center, and Jeremiah W. (Jay) Nixon, Attorney General of Missouri, with respect to the question of whether this Court's decision in *Bullington v. Missouri*, 451 U.S. 430 (1981), was correctly decided. In *Bullington*,

the Court applied the Double Jeopardy Clause to sentencing decisions. Amici contend that *Bullington* was incorrectly decided and that this Court should take the opportunity presented in this case to reconsider the issue of whether the Double Jeopardy Clause applies to capital sentencing decisions.

In the ruling below, the United States Court of Appeals for the Eighth Circuit relied on *Bullington* in applying the Double Jeopardy Clause to a sentencing decision in a non-capital case. The sentencing issue in this case was whether the respondent was subject to an enhanced sentence as a persistent offender.

Prior to this Court's ruling in *Bullington*, the Double Jeopardy Clause had never been applied to a sentencing decision. The Amici contend that the protections the Double Jeopardy Clause was designed to enforce are not implicated by permitting successive sentencing proceedings. Therefore, if this Court's decision in *Bullington* is not reversed, the Amici, states with capital punishment statutes, will continue to be barred from seeking a death sentence after a retrial when the first sentencing proceeding resulted in a life sentence.

SUMMARY OF ARGUMENT

The Double Jeopardy Clause was incorrectly applied to capital sentencing proceedings in *Bullington v. Missouri*, 451 U.S. 430 (1981), for several reasons. First, the applicability of the Double Jeopardy Clause should not depend on the procedures employed in sentencing. The majority in *Bullington* applied the Double Jeopardy Clause to capital sentencing proceedings in part because the physical characteristics of a capital sentencing proceeding resembled the guilt/innocence phase of the trial. However, this Court has repeatedly held that the possibility of a higher sentence is a legitimate concomitant of the retrial process in non-capital proceedings. Given the number and magnitude of substantive and procedural safeguards mandated by the Eighth and Fourteenth Amendments, the sentence of death should not be treated differently than any other statutorily authorized sentence.

Second, the applicability of the Double Jeopardy Clause cannot turn on the procedures employed in sentencing because the individual states are constitutionally permitted to enact unique procedures governing capital sentencing proceedings. The Double Jeopardy Clause must receive a more universal and comprehensive application.

Third, even if the applicability of the Double Jeopardy Clause should center upon the specifics of the procedures employed, the mere presence of uniform standards or factors, such as aggravating and mitigating circumstances and the statutorily mandated weighing process, should not be dispositive of the issue. The mere presence of standards employed to channel the jury's

discretion do not in and of themselves invoke the protection of the Double Jeopardy Clause.

Finally, a finding by a jury of a sentence of life does not always indicate a failure of proof upon the part of the State. In *Bullington*, the jury was instructed that it had the discretion to reject a death sentence even if it found an existence of overwhelming aggravating circumstances which outweighed all evidence offered in mitigation and justified a sentence of death. This factor, alone, negates the *Bullington* majority's reasoning that the jury's selection of a life sentence necessarily implies that the State failed to introduce sufficient evidence to support a sentence of death. There are situations when the majority opinion in *Bullington* would prohibit resentencing when there was no failure upon the State's part with regard to its evidentiary proof.

While a sentence of death is certainly severe and non-reversible, it should be no different than any other sentence in the context of the Double Jeopardy Clause. The States should not be precluded from seeking a sentence of death after a retrial when the first trial proceeding resulted in a life sentence.

ARGUMENT

The Amici agree with and adopt the petitioners' argument that this Court's decision in *Bullington v. Missouri*, 451 U.S. 430 (1981) expands the protection afforded by the Double Jeopardy Clause contrary to the original intent of the Clause as articulated by the framers of the Constitution and beyond the traditional protections of the Clause. For the reasons discussed herein, the Amici respectfully submit that this Court should revisit the majority opinion in *Bullington*.

First, the applicability of the Double Jeopardy Clause should not depend upon the procedures employed in sentencing. As the petitioners correctly note, Justice Powell, in his dissent from the majority opinion in *Bullington*, stated that any distinction between the Missouri capital sentencing scheme and those employed in *United States v. DiFrancesco*, 449 U.S. 117 (1980); *Chaffin v. Stynchcombe*, 412 U.S. 17 (1973); *North Carolina v. Pearce*, 395 U.S. 711 (1969) ; and *Stroud v. United States*, 251 U.S. 15 (1919), the leading opinions which hold that the imposition of a greater sentence upon retrial is constitutionally permissible, are "immaterial for purposes of the Double Jeopardy Clause." *Bullington v. Missouri*, 451 U.S. at 448 (n. 2) (Powell, J., dissenting). The Amici contend that Justice Powell was correct.[1]

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[1]Justice Powell was joined in his dissent by Chief Justice Burger, Justice White, and Justice Rehnquist.

In deciding the applicability of the Double Jeopardy Clause, the physical characteristics of the sentencing proceeding or its resemblance to the guilt/innocence phase of a capital murder trial should not be the controlling factors of such an inquiry. Rather, as the dissent correctly noted, "the question is whether the reasons for considering an acquittal on guilt or innocence as absolutely final apply equally to a sentencing decision imposing less than the most severe sentence authorized by law." *Id.* at 450. However, the traditional "reasons" or principles underlying the Double Jeopardy Clause, i.e., the enhanced possibility of conviction, and the repeated and prolonged anxiety placed upon the defendant, are not valid concerns in either the capital or non-capital sentencing contexts. Indeed, this Court has held that "[t]he possibility of a higher sentence [has been] recognized and accepted as a legitimate concomitant of the retrial process." *Id.* at 451 (quoting *Chaffin v. Stynchcombe*, 412 U.S. 17, 25 (1973)). The dissent interpreted this prior ruling to mean that "[t]he possibility of a higher sentence is acceptable under the Double Jeopardy Clause, whereas a possibility of error as to guilt or innocence is not, because the second jury's sentencing decision is as 'correct' as the first jury's." *Id.*

It is clear that such an occurrence does not violate the Double Jeopardy Clause in the non-capital context. *North Carolina v. Pearce*, 395 U.S. 711 (1969); *Moon v. Maryland*, 398 U.S. 319 (1970); *North Carolina v. Rice*, 404 U.S. 244 (1971); *Colten v. Kentucky*, 407 U.S. 104 (1972); *United States v. DiFrancesco*, 449 U.S. 117 (1980). Given the number and magnitude of substantive and procedural safeguards, which this Court has determined are mandated by the Eighth and Fourteenth Amendments, the sentence of death should not be treated

differently than any other statutorily authorized sentence. *Furman v. Georgia*, 408 U.S. 238 (1972); *Gregg v. Georgia*, 428 U.S. 153 (1976); *Proffit v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Lockett v. Ohio*, 438 U.S. 586 (1978); *Enmund v. Florida*, 458 U.S. 782 (1982); *California v. Ramos*, 463 U.S. 992 (1983); *Ake v. Oklahoma*, 470 U.S. 68 (1985); *Caldwell v. Mississippi*, 472 U.S. 320 (1985); *Skipper v. South Carolina*, 476 U.S. 1 (1986); *Ford v. Wainwright*, 477 U.S. 399 (1986); *Lowenfield v. Phelps*, 484 U.S. 231 (1988); *Mills v. Maryland*, 486 U.S. 367 (1988); *Booth v. Maryland*, 482 U.S. 496 (1987); *South Carolina v. Gathers*, 490 U.S. 805 (1989); *Penry v. Lynaugh*, 492 U.S. 302 (1989); *Blystone v. Pennsylvania*, 494 U.S. 294 (1990); *McCoy v. North Carolina*, 494 U.S. 433 (1990); *Boyde v. California*, 494 U.S. 370 (1990); *Sawyer v. Smith*, 497 U.S. 227 (1990); *Lewis v. Jeffers*. 497 U.S. 764 (1990); *Sochor v. Florida*, 504 U.S. ____, 112 S.Ct. 214 (1992). Correspondingly, the possibility of receiving the sentence of death upon retrial after a previous sentence of life without parole should be as with any other sentence -- a "legitimate concomitant of the retrial process." *Bullington v. Missouri*, 451 U.S. at 451 (quoting *Chaffin v. Stynchcombe*, 412 U.S. 17, 25 (1973)) (Powell, J., dissenting).

Second, the above argument is bolstered by the fact that individual States are indeed constitutionally permitted to enact procedures substantially and sometimes radically different from those employed in *Bullington*. *See Graham v. Collins*, ____ U.S. ____, 113 S.Ct. 892 (1993); *see also Lowenfield v. Phelps*, 484 U.S. 231 (1988). Given the number of varying procedures which are constitutionally permitted, the petitioners

correctly note that the application of the Double Jeopardy Clause should not turn solely upon the procedures employed by the individual States. The Double Jeopardy Clause should be given a more universal and comprehensive application unobscured by numerous piecemeal exceptions and qualifications.

Third, even if the focus of an inquiry as to the applicability of the Double Jeopardy Clause to the sentencing phase of a capital murder trial should center upon the specifics of the procedure employed and its characteristic resemblance to the guilt/innocence phase, the mere presence of uniform standards or factors, such as aggravating and mitigating circumstances and the statutorily mandated weighing process, should not, in and of themselves, be dispositive of the issue. As the majority correctly noted, the procedure employed in *United States v. DiFrancesco*, 449 U.S. 117 (1980) required a specific showing of additional factors aimed at proving the defendant was a "dangerous special offender." *Id.* Regardless of the distinction drawn by the majority, it is clear that the mere presence of standards employed to channel the jury's discretion do not in and of themselves invoke the protection of the Double Jeopardy Clause. They should have no more significance in the capital sentencing context.

The same is true of the other constitutionally required limitations which are placed upon the capital sentencing jury's discretion. Should the applicability of the Double Jeopardy Clause truly turn upon the number of choices offered to the jury? It is clear that society mandates few punishments it considers appropriate to recompense an offense as serious as capital murder. Simply put, a wide range of possible sentences is neither available nor

appropriate in the context of a capital offense. The mere fact that the capital sentencing jury is faced with fewer choices than its non-capital counterpart should be of no significance.

Finally, with regard to the jury's limited discretion, the *Bullington* dissent correctly noted that a sentence of life does not always indicate a failure of proof upon the part of the State. For example, the jury in *Bullington* was specifically instructed that it had the unfettered discretion to reject a death sentence even if it found the existence of overwhelming aggravating circumstances which outweighed all evidence offered in mitigation and justified a sentence of death. *Bullington v. Missouri*, 451 U.S. at 434-435. This factor, alone, usurps the majority's reasoning that the jury's selection of a life sentence necessarily implies that the State failed to introduce sufficient evidence to support a sentence of death. Therefore, the majority's total reliance upon the sufficiency of the evidence exception established in *Burks v. United States*, 437 U.S. 1 (1978) is misplaced, at least when applied on a wholesale basis with no articulated exceptions. Even where there is no failure upon the State's part with regard to its evidentiary burden, the majority opinion in *Bullington* prohibits resentencing. The majority's reasoning does not account for this situation nor does it allow for the number of possible variations of procedure noted above. The petitioners properly contend that the majority opinion in *Bullington* stretches the parameters of the Double Jeopardy Clause too far.

The Amici agree with the petitioners' contention that, while a sentence of death is certainly severe and nonreversible, and, correspondingly, deserving of

numerous constitutional protections, it should be no different than any other sentence in the context of the Double Jeopardy Clause. A defendant facing retrial with the possibility of life or a large number of consecutive sentences for multiple terms of years is, for all practical purposes, in the same position as the defendant facing death. While there are numerous differences, both philosophically and procedurally, as a base consideration, a multiple offender defendant facing the possibility of, for example, 150 years in prison is no different than the defendant facing death. The only difference is the timing. Each will spend the remainder of his life in prison. There is no reason the non-capital defendant should be treated differently. Pursuant to the long established line of cases preceding *Bullington*, the defendant facing 150 years can be retried and receive the same, or if possible, a greater sentence without any violation of the Double Jeopardy Clause. There should, likewise, be no violation when the capital defendant receives a greater sentence upon retrial. As a practical matter, should the capital defendant who receives a life sentence be afforded greater protection than the non-capital defendant who receives multiple life terms? Should the procedural aspects of the capital sentencing procedure truly be sufficient justification for such a disparity? The Amici contend that they should not.

CONCLUSION

The Amici adopt and agree with the petitioners' arguments and suggest that this Court respectfully grant their petition for certiorari in the above captioned matter.

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